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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 6, Original

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE STATE OF CALIFORNIA

REPORT OF SPECIAL MASTER

(Under Order of June 27, 1949)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 11, Original

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE STATE OF CALIFORNIA

REPORT OF SPECIAL MASTER

(Under Order of June 27, 1949)

The Court, by its order of June 27, 1949, directed me to "proceed with all convenient speed, with respect to the seven coastal segments enumerated in Groups 1 and 2" of my report of May 31, 1949, to consider: "(1) a simplification of the issues; (2) statements of the issues and amendments thereto in the nature of pleadings; (3) the nature and form of evidence proposed to be submitted, including admission of facts and of documents which will avoid unnecessary proof; and report thereon to the Court".

The Issues

My report of May 31, 1949 (pp. 3-4) defined as follows the questions necessary to be determined by judgment of the Court before any survey could be undertaken:[1]

1. What is the status (inland waters or open sea) of particular channels and other water areas between the

[1] The questions are here stated in reverse order of their statement in the 1949 report. This reversal—proceeding here from the open sea toward the shore—will result in a more convenient statement of the issues and of the nature and form of the evidence proposed to be submitted.

mainland and offshore islands, and, if inland waters, then by what criteria are the inland water limits of any such channel or other water area to be determined?

2. Are particular segments in fact bays or harbors constituting inland waters and from what landmarks are the lines marking the seaward limits of bays, harbors, rivers and other inland waters to be drawn;

3. By what criteria is "the ordinary low-water mark on the Coast of California" to be ascertained.

These are the issues that need to be disposed of at this stage of the proceedings.

Before proceeding to summary statements of the positions of the parties, in the nature of pleadings, with respect to these three issues, I note, at the request of the parties, two points which they respectively insist upon but which lie outside of the directive in the Court's order of June 27, 1949.

First: California continues to oppose the determination by judicial decree of any of the boundary lines under consideration. It continues to contend that the questions involved in the determination of these boundaries "are purely legislative in character beyond the power of this Court". It does not suggest that it is within the Special Master's assignment to comment on this contention (Cf. Special Master's Report of May 31, 1949, p. 5); but it does ask that its continued insistence on the point be noted. Furthermore, California takes exception to the exclusion in my report of May 31, 1949, of the two segments, Arcata-Humbolt Bays and Bodega-Tomales Bays (Cf. report pp. 4-5).

Second: The United States throughout the proceedings leading up to the report of May 31, 1949, and throughout these proceedings under the order of June 27, 1949, has asserted, and California has not denied, that the three coastal segments comprising Group 1 are the only segments of offshore land along the California coast from which pe-

troleum is being taken. For that reason the United States insisted in the earlier proceedings, and it still insists, that only the three oil-producing segments comprising Group 1 call for adjudication at this time. But in the report of May 31, 1949, I recommended adjudication of seven segments in order that the questions involved in the determination of criteria for locating the base line of the marginal belt might be presented in a sufficient, but not in an excessive, variety of aspects (Cf. report of May 31, 1949, p. 4) and by the subsequent order of June 27, 1949 I was directed to proceed "with respect to the seven coastal segments enumerated in Groups 1 and 2".

It is clear, however, that no physical survey could be undertaken of any segment of the coastline, and no final decree could be entered, until after the above-stated criteria have been judicially determined and their concrete application to the seven segments of the coastline has been given consideration. Whether in any, or in which, of the seven segments an actual survey will then be required cannot now be predicted.

The Positions of the Contending Parties

The ultimate claims of the parties as to the location of the base line of the marginal belt at each one of the seven coastal segments are set forth, with reference to accompanying charts, in Appendix I.

The contentions of the parties as to the criteria to be applied in locating the base line will be stated, with reference to the three questions listed above, in what follows:

> *Question* 1. What is the status (inland waters or open sea) of particular channels and other water areas between the mainland and offshore islands, and, if inland waters, then by what criteria are the inland water limits of any such channel or other water area to be determined?

Position of the United States

Each of the channel and other water areas between the mainland and offshore islands (referred to on Charts 5202 and 5101 as the Santa Barbara Channel, San Pedro Channel, Outer Santa Barbara Passage, and Gulf of Santa Catalina) consists of open sea and the three-mile marginal belt of the Pacific Ocean should be measured, in each instance, along the shore of the mainland opposite such channels ~~of~~ or other water areas. Each offshore island is enveloped by its own marginal belt (Vol. A/18-19).[2]

The position of the United States as to whether the waters within a strait are "territorial sea" or "high sea" is stated (A/19-20), but, because we are here concerned with the location of the base line of the marginal belt (territorial sea), rather than with any rule that assimilates "high sea" into the marginal belt, this portion of the statement is relegated to Note 1 at the end of this report.

California's Position

The base line of the marginal belt is a line, referred to as the "exterior" or political coastline, running outside of all ports, bays, harbors, and other bodies of inland waters and along the seaward side of the outermost off-lying rocks and islands (I/16).[3] The channels and passages embraced within these boundary lines are part of the State of California and of the territory of the United States. The seaward limits of such channels and other bodies of inland water (the base lines of the marginal belt) are to be de-

[2] The binder marked "Volume A" transmitted with this report contains three communications from counsel for the United States: (1) "Memorandum of the United States In Response to The Request of Special Master of June 29, 1949", dated August 12, 1949; (2) Letter from the Solicitor General of August 19, 1949; and (3) Letter from the Solicitor General of February 13, 1950.

[3] See footnote, page ~~10~~ 11.

termined by lines drawn from projecting points on the mainland and on outlying islands (I/20-21).

Even where the base line is drawn along a shore which confronts the open sea, California suggests that an important question will arise as to whether the marginal belt is to be measured from every conceivable point along the shore or only from straight lines drawn between salient points (I/17).

Question 2. Are particular segments in fact bays or harbors constituting inland waters and from what landmarks are the lines marking the seaward limits of bays, harbors, rivers and other inland waters to be drawn?

Position of the United States

For indentations having pronounced headlands no more than ten nautical miles apart a straight line shall be drawn across the entrance; the envelope of all arcs of circles having a radius equal to one-fourth the length of the straight line shall then be drawn from all points around the shore of the indentation; if the area enclosed by a straight line across the entrance and the envelope of the arcs of the circles is greater than that of a semicircle with a diameter equal to one-half the length of the line across the entrance, the waters of the indentation shall be regarded as inland waters; if otherwise, the waters of the indentation shall be regarded as open sea.

Where the headlands are more than ten nautical miles apart, the line shall be drawn across the indentation through the point nearest the entrance at which the width does not exceed ten miles, and the same procedure shall be employed to determine the status of the waters inside that line (A/15).

The United States recognizes that allowances may have to be made for "existing agreements and 'historic' situa-

tions'' but it contends that the burden of establishing such exceptions should be upon California (A/15).

Applying the formula proposed, the United States finds that none of the seven segments selected for adjudication presents a bay constituting inland waters. It recognizes, of course, that within the segments of coastline boundary to be determined, there are certain small bays and rivers entering the ocean, which constitute inland waters within the foregoing criteria.

It concedes that at least a part of San Pedro Bay is inland waters and that with respect to this segment (Group 1, Segment (b)), the only line to be located is that constituting the seaward limit of inland waters. It proposes (see Appendix I, p. 9) a line which cuts through the outer reach of the existing government breakwater. It maintains the propriety of that line notwithstanding that the American proposals at The Hague Conference upon which it relies for the delimitation of bays, estuaries and river mouths, provided with respect to ports that the outermost permanent harbor works shall be regarded as part of the coast in determining the base line of the marginal belt. It takes the position that if prior to the construction of these harbor works the seaward boundary of the inland waters of the bay were properly fixed at the line which the United States presently suggests, then the subsequent construction of the harbor works would not operate as a transfer of title to or dominion over the area embraced by the expanded harbor works, even though under The Hague proposals the extension might perhaps change the rights of the United States as against foreign countries (Transcript of Proceedings before the Special Master, p. 122).

As to *river mouths,* the United States maintains that when a river flows directly into the sea the waters of the river constitute inland waters up to a line following the general direction of the coast drawn across the mouth of the

river whatever its width. If the river flows into an estuary the rules applicable to bays apply to the estuary (A/18).

As to *landmarks,* its position is that where pronounced headlands exist at tributary waterways a straight line marking the seaward boundary of the tributary waters is to be drawn joining the outermost extensions of these natural headlands. Where the headland is not pronounced the terminus of the line should be the point of intersection of the ordinary low-water mark with a line bisecting the angle formed by a line coinciding with the general trend of the ordinary low-water mark along the open coast and a line coinciding with the general trend of the ordinary low-water mark along the shore of the tributary waterway (A/2).

California's Position

California states its position thus: "That is a bay which has been historically recognized as such, or which is authoritatively determined to be such", as illustrated in the decisions in the California Supreme Court in *People* v. *Stralla,* 14 Cal. 2d, 617, 96 Pac. 2d 941, and *Ocean Industries etc.* v. *Superior Court,* 200 Cal. 235, 252 Pac. 722 (I/72); the determination must take account of physical and geographic factors, use and occupancy of the area, maritime trade routes, international practices and general national interests (Trial Brief of California, filed with Special Master, Apr. 21, 1949, p. 36 *et seq*). (Note: See letter of March 28, 1951, Mattoon to Special Master).

With respect to the line proposed by the United States at San Pedro Bay, California specifically objects to it on the ground that it "comes inside the San Pedro Breakwater. We know of no definition of a Port or Harbor which would permit the drawing of the seaward limit of such Port or Harbor inside of the outermost of the permanent harbor-works or installations" (I/57-58).

California also lists the following areas which it claims are inland waters because they are, it asserts, ports and harbors, as well as roadsteads:

Crescent City Port and Harbor
Ports and Harbors within Monterey Bay
San Luis Obispo Port and Harbor
Santa Barbara Port and Harbor
Ventura Port and Harbor
Ports and Harbors within Santa Monica Bay
Newport Beach Port and Harbor

(I/58).

As to *river-mouths* California has not objected to the rule proposed by the United States (ante p. 10).

As to *landmarks,* California's position is that where a bay is claimed as inland waters solely because it is a bay—for example Monterey Bay and San Luis Obispo Bay—the lines marking the seaward limits are to be drawn between the more prominent headlands which by their protrusion give the bay its character as such. If it becomes necessary to establish the seaward limit of any harbor the line should be drawn along the outermost of the permanent harbor-works or installations (I/19).

Nature and Form of the Evidence Proposed to Be Submitted on Questions 1 and 2

Neither party contends, or proposes to submit any evidence to prove, that the criteria it now advances for answering Question 1 or Question 2 above have heretofore been definitively adopted by the United States or established as customary rules of international law.

The *United States* recognizes that these two questions present problems which have international aspects and require consideration of documentary materials reflecting

developments in the field of international law, and that the problems presented may also call for reference to historical and geographical data pertinent to the coastal segments under consideration. But it regards these problems as *legal* issues to be determined by the Court without the necessity of any prior hearings or testimony before a commission or master, on reference to documentary records of occurrences in the field of international law, to official publications of the legislative and executive branches of our Government; to recognized historical documents and treatises, and to authoritative technical and scientific publications.

More specifically, the United States refers to the proposals as to geometric criteria for determining the status of straits between the mainland and offshore islands and for determining the seaward boundaries of the inland waters of bays, etc., made by the Delegation of the United States at the Conference for the Codification of International Law held at The Hague in March-April, 1930, under the auspices of the League of Nations.

It says that The Hague Conference of 1930 "did not, of course, result in any treaty or convention * * *. However, there was considerable unanimity * * * in respect to certain of the questions before the Conference and the views expressed at that time * * * constitute, in our opinion, valuable and pertinent indications of the extent to which the various concepts [were] discussed and developed at that time. Of particular importance, we think, are the proposals made by the Delegation of the United States at the Conference" (A/6-7).

In the event that the documents it proposes to refer to are not subject to judicial notice, the United States proposes to offer in evidence a limited number of charts and publications of which it has submitted a list to the Special Master (see A/23 and 24). It makes this offer, however, without

limitation of its right to refer to matters of common knowledge and documents or events of which the Court will take judicial notice, and with the reservation that "it might, in some instances, be necessary to introduce oral testimony for the purpose of demonstrating the applicability of the contents of a document to a particular situation" (A/23).

California takes the position that the base line of the marginal belt has never been determined or fixed by anybody in the United States; by either the legislative, the executive or the judicial departments of the government; that there is no law of the United States defining for general purposes the inland waters of the United States or fixing the base line for measuring the marginal belt; that there are no general rules of customary international law which answer the questions propounded and, in short, that "as a nation we are now free to fix that base line wherever we feel it ought to be fixed consistently with international practice"; and that the United States, in making the determination, is free to be guided by what it considers to be its best interests.[4]

The evidence California proposes to submit is offered to show that the criteria which it now advances are supported by wide international practice in other parts of the world, and that their adoption by the United States would violate no principle of international law and would be consistent with the positions taken by the United States in the past.

It takes note of the proposals made by the Delegates from the United States at The Hague Conference of 1930, but it opposes the geometrical criteria advanced in those proposals and does not suggest any geometrical substitute.

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[4] It is upon this asserted absence of any defined position of the United States and any established custom in international law that California bases its continued insistence that the questions involved in the determination of these boundaries "are purely legislative in character beyond the power of this Court".

It takes the position that the proposals which were not adopted by the Conference had no binding force and that there is no precedent either in law or practice or custom (national or international) for the employment of any geometric criteria such as or comparable with those proposed by the United States (I/70-71).

The material which California proposes to submit in support of its contentions is in the form of documents and oral testimony purporting to show "the history of each of the segments, its physiographical character, the activities carried on within its limits, and the legal considerations which lead to the placing of the limits of inland waters as distinguished from marginal seas" (I/29).

With the reservation that its summary cannot be complete without full knowledge of the principles and precedents upon which the United States intends to rely, California has, at my request, summarized the nature of its proposed oral testimony and has indicated what is intended to be proved by the many documents to which it proposes to refer. It has submitted, and I transmit with this report, two volumes, (I) "Summary of Testimony of Typical Witnesses" and (II) "Citation of Documents"[5], and a large number of official charts and maps.

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[5] In this report these two volumes are referred to as I and II, with arabic numerals indicating the pages.

Volume I contains the statement of California in response to the Special Master's letter of June 29, 1949, of August 12, 1949 (I/3-56); comments dated August 23, 1949 on a memorandum of the United States in response to the Special Master's letter of June 29, 1949 (I/57-83); and summaries of testimony of witnesses arranged under six subdivisions: Subdivision I—"Overall Unit Area of Inland Waters"; Subdivision II—San Pedro Bay and Long Beach Harbor; Subdivision III—Santa Monica Bay; Subdivision IV—San Luis Obispo Bay; Subdivision V—Monterey Bay; and Subdivision VI—Crescent City Bay. In Volume II, the citation of documents is accompanied by a statement as to what is intended to be proved by them. There are extracts of the pertinent portions of the text of the documents in the field of international law to which Judge Hudson plans to refer. This volume is arranged under the same six subdivisions as Volume I. The charts and maps are listed in Appendix 2.

California's Proposed Oral Testimony of Experts

Judge Manley O. Hudson:

To prove relevant occurrences in the field of international law, California offers the testimony of Judge Hudson to show that when the actual practice of States is examined they appear to have been guided by no uniform rules; that within only the most general limitations each State remains free to define its inland waters and to fix the base line of its marginal sea as its own interest may be deemed to require; that such wide variations are encountered in the practice of the various States that a State can adduce precedents for any action, within reason, which it may wish to take for the protection of its national interests (II/10).

More specifically (I/31-32) his proposed testimony is summarized as follows (I/34-35):

> "1) He will outline the present state of international law with regard to territorial waters and, particularly, with regard to the location of the baseline of the marginal belt, as such law has been developed in international treaties and in the practice and custom of nations.
>
> "(2) He will show how the failure of the nations to reach any agreement on the subject of territorial waters at The Hague Conference in 1930 has influenced the development of international law on this subject; also, how the diverse claims made by the various nations at The Hague Conference bears upon the present state of international law and practice with regard to territorial waters.
>
> "(3) He will cite and explain the statutes, decrees and diplomatic instruments of a number of coastal nations, showing how these statutes, decrees and instruments deal with the delimitation of inland waters and the establishment of the base-line of the marginal sea. . . ."

There is in Volume I a further summary of Judge Hudson's proposed testimony as to when the waters of a bay are to be regarded as inland waters (I/125-132) and as to the status of water areas between the mainland and offshore islands (I/133-138).

It is said that he "is prepared to show that a great number of states place the baseline of the marginal sea along the outer edge of the most outlying islands, islets, rocks and reefs along their coast, without regard to the distance by which they are separated from the mainland coast" (I/134) and that in his proposed testimony he will "relate the results of his exposition of practices in other parts of the world to each of the segments of the coast of California presently under examination and thus show what might properly be the position taken by the United States with respect to the fixation of a boundary line between inland waters and open sea" (I/129).

The chosen extracts from the text of each one of the documents proposed to be submitted in connection with the testimony of Judge Hudson [6] have been examined with care. The documents (statutes, decrees and diplomatic instruments) appear, without exception, to relate to occurrences in the field of international law of a character to which reference could and would be made by court or counsel engaged in research in that field (*The Paquette Habana,* 175 U. S. 677; *Jones* v. *U. S.,* 137 U. S. 202; *People* v. *Stralla,* 14 Cal. 2d 617; 96 Pac. 2d 941). There is no suggestion of

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[6] At pages 12-58 of Volume II, some 169 documents are listed under the subjects: A. Islands (12-25); B. Bays, subdivided into "I. Claims to all bays, without regard to dimensions" (26-30); "II. Claims to particular bays of Great Dimensions" (31-39); and "III. Claims to Bays of Limited Dimensions but Wider Than 10 Miles" (40-46); C. Ports and Harbors, subdivided into "I. Ports, Entrances to Ports, Roadsteads and Harbors Included in Inland Waters" (47-52); and "II. Claims to Particular Ports and Harbors" (53); D. Salient Points (54-55); E. Banks (56-57); F. Wharves (58).

any factual controversy about the contents of any one of the documents, such as would require resort to evidence drawn from the background of, or from contemporary construction of, the particular document. In short, the authenticity of the individual documents is not to rest on the testimony of the witness as to controverted facts; rather the proposed testimony of Judge Hudson is to rest for its authenticity upon the documents and upon his experience in the field of international law.

After examining the documents I am convinced that a commentary by Judge Hudson upon them, including, among other things, a statement of his views as to the significance of the several documents with reference to California's contentions, would be enlightening and helpful. Such comment might be presented to the Court in a brief, as was done in the main brief in this case, or by an additional memorandum as Professor Hyde and Dean Pound did in the *Texas* case. California, however, very greatly prefers, and strenuously insists, that what Judge Hudson has to say should be said in the form of sworn testimony.

Dr. John W. Caughey:

It is proposed that Dr. Caughey, Professor of History, University of California at Los Angeles, 1930-1949, "will present historical data as to the discovery of each of the bodies of water in question, with particular reference to the manner in which those areas were treated, that is as to whether they were to be considered inland waters or open ocean. He will describe the use and development of these areas from the historic times down to the time when official United States records commenced to be made and will present such historical facts as bear on the question whether these areas are inland waters by reason of having been recognized historically as such" (I/40-41).

In the summary of Volume I, his proposed testimony with respect to the overall unit of inland waters is set forth in some detail (I/178-185) and, with reference to whether particular segments are in fact bays or harbors constituting inland waters, his proposed testimony is outlined separately as to Crescent City Bay, Monterey Bay, San Luis Obispo Bay, Santa Monica Bay, and San Pedro Bay (I/160-177).

The nature of the historical facts which California proposes to prove by this witness is summarized as, "* * * the historical facts that suggest that the waters between the southern California mainland and its islands are protected, inland waters rather than open sea":

> "1) The boating, fishing Indians here at the time of the coming of the white man used these waters constantly, shuttling back and forth to the islands.
>
> "2) Early navigators, from Cabrillo to Vancouver, certified that the channel provided a safe passage and that, in the various anchorages afforded, ships could find shelter from any storm.
>
> "3) The sea-otter hunters and traders and the hide traders worked this entire region in all kinds of weather. They landed and loaded at dozens of anchorages. In their day this represented almost the total commerce of southern California.
>
> "4) For many years after the United States took over, southern California was heavily dependent on sea routes, especially to San Francisco. As improvements were made at San Pedro, traffic increasingly centered there, but ships continued to stop at many places along the coast south of Point Conception.
>
> "5) The low ratio of wrecks south of Point Conception to those north of that point is further evidence of the protected character of the waters inside the chain of islands." (I/184-5).

Dr. Caughey's proposed historical summary is centered upon the asserted fact that historically the waters in ques-

tion have been recognized to be and have been used as sheltered waters. Thus (II/327-332) some forty-odd historical documents are listed which Dr. Caughey would refer to in commenting upon the original discovery of the waters in question, their appearance in subsequent exploration and their increasing occupation and use for maritime commerce up to the present time. Again, some nineteen documents are listed as reciting the use of the waters in question by the Indians, as observed by early settlers, for regular intercourse in commerce between islands and mainland, together with reports by early navigators of sheltered anchorages at many places within the area and references to the good and safe passage between the islands and the mainland (II/333-337). To show the asserted use of the area in the hide trade which was a principal business along the coast, eleven documents are listed (II/338-9). And to support the proposed oral testimony of the witness, "that the accident record for the California coast contains at least a suggestion on the protected character of the waters of Southern California", four documents are referred to (II/340-341). With particular reference to San Pedro Bay and Long Beach Harbor, fourteen documents are listed (II/431-433); fifteen are listed in connection with Santa Monica Bay (II/485-487); eighty-four in connection with the history of Monterey Bay (II/527-543) and twenty-four in connection with the history of Crescent City Bay (II/579-584).

Extracts of these documents have not been submitted by California, but the statements of what they are intended to prove illustrate their nature. They appear to be generally available historical documents and treatises such as courts are accustomed to take judicial notice of (see *The Antelope*, 10 Wheat. 66, 130; *Hoyt* v. *Russell*, 117 U.S. 401, 405). A commentary from Dr. Caughey pointing out the

significance of these documents to the central question of the sheltered character of these waters and their use as such would certainly be enlightening and useful. Here, as in the case of the proposed commentary by Judge Hudson, it could be presented as historical commentary by recognized authority, with or without the support of an oath and with or without opportunity for cross-examination. California earnestly insists that it should be permitted to submit the material with the support of oral testimony.

Gerald C. Fitzgerald:

Mr. Fitzgerald, a civil engineer of wide experience in California (I/88), "as an expert, will describe the physical and geographical features of the segments as related to problems of navigation, harbor use, and shoreline development and with reference to wind and wave conditions * * *. He will also present facts as to the nature and extent of the improvements in the segments and the nature and extent of the use of these segments and the facilities therein, with the volume and value of traffic * * *. On the basis of his expert knowledge and experience he will give opinion testimony as to the character of the bodies of water involved" (I/36-38).

His proposed testimony is summarized by California as follows (I/121-122):

> "The sheltered waters existing between the mainland and the Channel Islands from Point Conception on the northwest, to Point Loma at the entrance to San Diego Bay, have a length of about 200 nautical miles, an average width of about 26 miles and an area of about 10,500 square miles.
>
> "These offshore islands, rocks, reefs, shoals, ledges and banks lie to the southward and parallel to the mainland blocking the force of the heavy westerly swell of the Pacific and affording a lee in winter from the full force of southerly swell and weather.

"A very considerable protection from oceanic waves from various directions is provided. There is a striking diminution in wave energy as one travels from the open sea west or north of Point Conception into the relative calm inland waters of Santa Barbara Channel. The amount of protection provided by these islands is augmented by wave refraction along their shoal shores.

"The steamer track lines between San Francisco, Los Angeles-Long Beach and San Diego Harbors, recommended by the United States Coast Pilot, lie within the over-all unit area, passing through Santa Barbara Channel, San Pedro Channel and the Gulf of Santa Catalina. The passage is free of dangers, has a deep channel and from the viewpoint of navigation is comparatively well sheltered.

"This overall unit area and the offshore islands have immense potential value for harbor development, shipping and National Defense.

"The physical and geographical characteristics of the over-all unit area and its use and occupancy are of such a nature as to establish its status as inland water."

Mr. Fitzgerald will, it is proposed, "present the results of his experience and expert research combined with factual and documentary evidence in a correlated manner" (I/105). The substance of this proposed testimony is presented in some detail (I/108-123).

As to whether the particular segments in question are in fact bays constituting inland waters, Mr. Fitzgerald's proposed testimony will be that of "an expert in problems relating to navigation and harbor use and shoreline development. He will present factual data which are the result of his own observations and documentary testimony in the form of hydrographic charts, topographic maps, official reports of federal and other governing bodies relating to the characteristics, improvement, maintenance, and oper-

ation of the harbors and their facilities. He will correlate all this factual data with observations based upon his wide experience in this field and demonstrate the status of these waters by reason of physical and geographical characteristics and from the viewpoint of use and occupancy'' (I/89). The substance of his proposed testimony is recited in detail with reference to each of the several segments involved (I/89-107).

In Vol. II, Citation of Documents, there are listed some 40 charts and maps and 8 official reports intended to be used in connection with the testimony of Mr. Fitzgerald to prove ''that this overall unit area and the offshore islands have immense potential value for harbor development, shipping and National Defense'' (II/6-9). Under subdivision II, San Pedro Bay and Long Beach Harbor, there are listed 12 charts and maps and 11 official publications to which Mr. Fitzgerald will refer to support his testimony that ''the waters of San Pedro Bay are comparatively well sheltered and the bay and channels of the harbors are navigable throughout the year'' and that ''the physical characteristics of San Pedro Bay and its use and occupancy are of such a nature as to establish its status as inland waters'' (II/418-420). For like purpose 11 charts and maps and 11 official publications are listed with reference to Santa Monica Bay (II/471-3); 7 charts and maps and 11 official publications with reference to San Luis Obispo Bay (II/497-8); 9 charts and maps and 9 official publications with reference to Monterey Bay (II/515-516); and 7 charts and maps and 7 official publications with reference to Crescent City Bay (II/566-7).

Mr. Fitzgerald's proposed opinion testimony from the point of view of the physical and geographical features of the various segments of the coast, centers upon (1) use and occupancy, their extent and potentialities and (2) the causes and extent of sheltering. The documents to which

he intends to refer are official government publications immediately available for general reference. There is nothing to suggest that the scientific facts involved would be subject to dispute, or, if disputed, that they would not be capable of immediate and accurate ascertainment by resort to authoritative scientific treatises.

The other testimony proposed to be submitted by California is supplementary to Dr. Caughey's proposed historical summary or to Mr. Fitzgerald's proposed testimony as to use and occupancy and sheltering. This includes the proposed expert testimony of Dr. Grant, Dr. Shepard and Mr. Putnam, and the proposed testimony of factual witnesses.

U.S. Grant IV:

The testimony of Dr. Grant, who is a Professor of Geology (I/139), is proposed by California to supplement the testimony of Mr. Fitzgerald but with "special emphasis on the geological history and character of the areas in question as it relates to the configuration and exposure of these areas to the elements and as affecting their use by commerce and navigation" (I/38-9).

As to the overall-unit area of inland waters, it is proposed that Dr. Grant will describe the geological history of the physical features and evaluate present-day geologic and oceanographic factors as related to their effects upon the waters between the islands and the mainland (I/150). The summary submitted includes a detailed statement of the substance of his proposed testimony (I/150-156) and reference is made to "joint studies made by Dr. Grant and the Scripps Institute of Oceanography" which he will discuss.

As to bays, etc., his proposed testimony will explain the geological background and history, and will describe the source, extent, and characteristics of wave action within

the areas under consideration (I/140). The summary includes specific reference to the individual bays in the several coastal segments under consideration (I/140-149).

In the Citation of Documents, California lists 13 official and technical publications relating to oceanography, to be referred to by Dr. Grant to show that the forecasting of wave conditions and the evaluating of the protecting effect of headlands, reefs, islands, shoals, submarine valleys, etc., is a recognized branch of engineering science and that the methods used by the witness and by Dr. Shepard are recognized and approved methods in oceanography (II/315-316). With reference to some 57 charts and by joint studies made by Dr. Grant and the Scripps Institute of Oceanography, the effectiveness of the offshore islands and reefs to shelter the bodies of water in question will be shown (II/317-321). Using 6 listed charts for illustration, it is proposed to show "that in many locations along the coast of California indentations which were formerly open to the sea have become almost completely, if not entirely, closed off by sand spits extending from one headland to another", thus creating bodies of land-locked water (II/322-323). By reference to 7 charts "and by the witness' possessing personal knowledge and experience", it is proposed to show the difference between the coastline of California and the Atlantic coastline of the United States, showing that, because of the subsidence of the Atlantic Coast, protection of coastal waters by outlying islands is common, whereas on the California coast, because there the shoreline has been produced in large part by elevation of the land with respect to the sea, land-locked bays are exceptional (II/324-326). With particular reference to San Pedro Bay, 3 charts are listed for use in conjunction with Dr. Grant's proposed testimony (II/430); 9 charts are listed in specific relation to his proposed testimony about

Santa Monica Bay (II/483-4); 5 charts are listed with reference to San Luis Obispo Bay (507); 6 charts are listed with reference to Monterey Bay (525-526); and 4 charts are listed with reference to Crescent City Bay (578).

Dr. F. P. Shepard:

California proposes to submit the oral testimony of Dr. Shepard, Professor of Submarine Geology, Scripps Institute of Oceanography (I/186) as an expert in submarine geology to testify "in regard to each of the areas in question as to the sources of wave action, height, intensity and frequency; also, as to the effect of topography, configuration and hydrography on reduction of wave action (wave refractions) and as to the combined effect of wave refractions and exposures in affording protection" (I/39). He will, California says, "make use of published charts, maps and reports included in Exhibit 5 [I/47-56] and also will present the results of his own investigations and research" (I/39-40). As proposed, "the scope of his testimony relates largely to wave refraction which involves the determination in a scientific manner of the effect of shoals, islands, promontories and other physical features upon the direction, height, intensity, and frequency of waves" (I/187). The outline of his proposed testimony is particularized with reference to the several segments of the coastline here under consideration, and with reference to the overall unit area of waters between the mainland and the outlying islands (I/187-198).

By Dr. Shepard's commentary on 13 listed publications it is proposed to prove "that the forecasting of wave conditions in any selected area is a recognized branch of engineering science and that the methods used by the witness in evaluating the protecting effects of headlands, reefs, islands, shoals, submarine valleys and other obstacles to

the uninterrupted passage and undiminished effect of wave currents have their basis within the precepts of this science," and in this connection he will discuss wave refractions (II/342-345). With the aid of some 55 charts, it is proposed that he will illustrate "physical features which contribute to the comparatively high degree of protection afforded vessels navigating the overall unit of inland waters" and these charts will be used "in conjunction with the testimony of the witness relating to the wave refraction studies for this area made by the Scripps Institute of Oceanography under his direction" (II/354-5). As with the other proposed witnesses, particular charts are listed in connection with the several individual segments of the coastline under consideration (II/469A, 495A, 564A, and 589).

This proposed expert testimony of Dr. Grant and Dr. Shepard centers on the physical causes of the sheltering of the waters under consideration and its effect upon their use by commerce and navigation. It is offered by way of corroboration—showing the reason why—of the proposed testimony of Mr. Fitzgerald. It approaches the subject from the point of view of explaining the natural laws that bring about the observed results. The documents proposed to be referred to are official and technical publications in the field of oceanography and official government charts. It is said that these two expert witnesses are prepared to give fact testimony about wave refraction studies confirmatory of their opinions, made by the Scripps Institute of Oceanography and in which they participated.

Rufus W. Putnam:

With reference to some 80 government charts, it is proposed that Mr. Putnam, a retired Army engineer now Executive Officer, California State Lands Commission

(I/199), will apply to specific locations along the coast of California his opin on testimony to the effect that the interest of national defense "will be violated if any line of demarcation between the open seas and inland waters is fixed shoreward of the seaward side of the outermost offlying rocks and islands, or of lines connecting the outermost projections of headlands" (II/356-360) and "that the physical characteristics of the channels, roadsteads, anchorages, foreshore, banks, headlands, islands, reefs, and other features affect favorably the ease and safety of transit, mooring and other use by vessels navigating the over-all unit of inland waters so as to permit the use of smaller craft of lighter construction." (II/361-364).

The new point in this proposed testimony, beyond use and occupancy and sheltering, is Mr. Putnam's opinion as to how the interest of national defense would be affected if the base line of the marginal belt is not drawn around the seaward side of the outermost offlying rocks and islands, as California proposes.

Proposed Oral Testimony of Fact Witnesses

Owen O'Neill, County Surveyor of Santa Barbara County from 1915 to 1946, is proposed as a witness "on the Historical, Physical, and Use and Occupancy aspects of the Santa Barbara Channel in substantiating that it is a body of inland waters". Two government publications; a number of government charts; and four chapters of the statutes of California are listed as documents to which Mr. O'Neill would refer (I/210-13; II/394-6).

Capt. W. H. Leisk, " • • • has had intimate knowledge of and experience in the waters along the coast of Southern California from Point Conception to Point Loma for many years" and is proposed as a witness on "the physical characteristics of the waters in this area and their proper

classification" (I/214-220; II/397-399). The factors about which he will testify are summarized (I/218-220) as (1) protection afforded by the islands to vessel from weather conditions outside of these waters; (2) a comparison of these waters with other waters such as "the waters at the entrance to Long Island Sound, those around Martha's Vineyard, and those around Rock Island which is at times exposed to the North Atlantic storms, and which are classified as 'inland waters' " (I/216), and other similar waters; (3) the fact that the "outlying islands which enclose these waters have always been a constituent part of the State of California"; (4) inland waters have always been considered from a navigational standpoint as less hazardous than international waters which can be established in this case because of the protective barrier which is formed by the outlying islands; (5) the fact that insurance rates on craft which ply the waters from Point Loma to Point Conception landward of the outlying islands are less than on craft which ply outside waters; (6) there are a substantial number of vessels which can and do safely navigate the waters inside this chain of offshore islands which, while suitable for these waters, would not be suitable for navigation north of Point Conception. It is proposed that he will testify "that the waters of this area are not to be designated or classified as international waters but they are to be definitely recognized and established as constituting 'inland waters'."

To the same effect, from their various experiences, the factual testimony of the following witnesses is proposed: E. A. Judd, President of the Pacific Towboat and Salvage Company (I/222-226; II/400); Richard R. Loynes, engaged in the Marine Engine and other business in Long Beach (I/227-229; II/401); Arvin O. Leavitt, Superintendent of the Long Beach Boat Yard (I/231-233; II/402); G. P. Ellington, Port Captain for the Van Camps Sea Food Com-

pany (I/234-236; II/403); William Collins, Station Master for the Pacific Tow Boat and Salvage Company (I/237-241; II/404); J. A. Jacobson, Pilot and Marine Surveyor (I/242-244; II/405); Charles Hopton, who maintains "the largest boat landing in Long Beach" (I/245-247; II/406); Jeff Hoag, an employee of the Pacific Tow Boat and Salvage Company, etc., an officer in the United States Coast Guard Station at San Pedro (I/248-251; II/407); Lawrence W. McDowell, Past Commander of the Pilot Squadron of the United States, Long Beach Division, and presently Commodore of the United States Power Squadron for the Thirteenth District, etc. (I/252-255; II/408); John J. Turner, Vice President of the Pacific Tow Boat Salvage Company, etc., formerly Chief in the United States Coast Guard (I/256-269; II/409); Joseph Fellows, Jr., President of Fellows and Stewart Shipyard at San Pedro (I/260-261; II/410); D. M. Callis, a Naval Architect with offices in Wilmington, Long Beach and Seal Beach, California (I/262-264; II/411); L. J. Wesseth, the Warden and Captain of the Bureau of Patrol and Law Enforcement of the Division of Fish and Game of the State of California (I/265-266; II/412); Fred E. Barnett, Master of the California State Fisheries Vessel N. B. Scofield (I/267-269; II/413); Paul D. Petrich, presently employed by the California Division of Fish and Game as Ship Master (I/270-273; II/414); R. L. Patterson, presently consultant engineer for the Orange County Harbor Department, the governing body of Newport Harbor (I/274-276; II/415); Schuyler Coffin, amateur yachtsman (I/277-278; II/416).

The testimony of E. C. Earle, a Harbor Engineer, and Charles A. Hale, a Civil Engineer, both formerly with the Harbor Department of the City of Los Angeles, is proposed on the physical aspects of the portion of the "unit area" consisting of San Pedro Bay, San Pedro Channel, Gulf of

Catalina and Outer Santa Barbara Channel, to support the position of California that this body of water "is inland water and that San Pedro Bay and Los Angeles Harbor are, respectively, a bay and harbor and therefore inland waters also" (I/290-311; II/437-454). A large number of government charts and publications and some California statutes are listed for reference (I/307-311; II/437-454).

The testimony of R. R. Shoemaker, Chief Harbor Engineer, and of Eloi J. Amar, Port Manager, of the Long Beach Board of Harbor Commissioners, is proposed on the "Use and Occupancy Aspect of San Pedro Bay, a historic bay and body of inland waters", with reference to many documents (I/313-320 and 322-325; II/455-467-9).

George Ross, Chairman of the Natural Resources Committee of the Chamber of Commerce of San Luis Obispo, is proposed as a witness "to testify from personal knowledge and data in his possession as to the Use and Occupancy of San Luis Obispo Bay, between the headlands of Pt. San Luis and Pt. Sal", making reference to statutes of California and records of San Luis Obispo County (I/352-3; II/512).

W. T. Masengill, retired Manager of the San Luis Transportation Company, is proposed as a witness to testify from his own knowledge and with records in his possession on the historical aspects and physical characteristics of San Luis Obispo Bay (I/354-5; II/513).

As to Monterey Bay, the proposed testimony is that of Clyde A. Dorsey, City Manager of the City of Monterey as to the physical characteristics of the bay and the Harbor development at the Port of Monterey, with reference to statutes of California and records of the City of Monterey (I/371; II/544); of Arnold M. Baldwin, County Surveyor of Santa Cruz County as to physical characteristics including shelter, with reference to statutes of California, Coast & Geodetic Survey charts and early histories (I/372;

II/545); of Leon Rowland, a "twenty year resident of the Santa Cruz area, and newspaper man", from his historical knowledge of this section of the Bay of Monterey, with reference to the "Annals of Santa Cruz" (I/373-4; II/546); of Peter J. Ferrante, attorney for the fishing industry at Monterey on use and occupancy of the bay by the fishing industry, with reference to official records (I/375; II/547); of Alexander D. Russell, City Engineer of Santa Cruz as to use and occupancy with reference to documents (I/376; II/548); of Robert Blohm, President of the Board of the Moss Landing Harbor District, located at the mouth of the Salinas River, with reference to statutes of California, records of the County of Monterey and government reports and charts (I/377-8; II/549); and of Mary L. Greene, Curator of the Custom House, a State Historical Monument at Monterey, on the historical aspects of the Bay of Monterey, from personal research and from historical documents under her care (I/379-383; II/550-564).

With particular reference to Crescent City Bay, testimony is proposed of Joseph A. Miller, from "his long, local association with affairs relating to the port of Crescent City", with reference to the "log of the Crescent City lighthouse"—1857-1900 (I/393-4; II/585); of Lyle Prickett, member of the Board of Harbor Commissioners of Crescent City "from the viewpoint of a local resident interested in and officially engaged in the development and operation of the harbor", with reference to government publications and charts (I/395-6; II/586-7); and of Charles T. Thunen, a member of the City Council of Crescent City as to use and occupancy and harbor development, with reference to government publications (I/397-9; II/588).

All of this proposed expert and factual testimony of Mr. Fitzgerald and the other supplementary witnesses, going beyond the proposed commentaries of Judge Hudson of oc-

currences in the field of international law and Dr. Caughey in the field of history, to deal with physical, geographical and oceanographical features and the resulting sheltered characteristics of the waters in question, is opposed by the United States on the grounds (1) that these facts are irrelevant; that they have no bearing on what are "inland waters" within the meaning of the decision and the decree of the Court, and (2) that the facts involved are "primarily the physical and geographical actualities" existing along each segment of the coast, "about which there should not be any dispute" since they "are facts which are known or available to everyone and which neither party hereto can deny; they are facts which do not call for formal proof. Moreover, such facts appear in readily available published documents which can conveniently be brought to the attention of the Court" (A/41 *et seq*). California, on the other hand, vigorously insists on the propriety and desirability of this oral testimony.

> *Question* 3. By what criteria is the "ordinary low water mark on the Coast of California" to be ascertained?

United States:

Ordinary Low Water Mark:

The United States interprets "ordinary low water" as the mean of all low waters, to be established by the United States Coast & Geodetic Survey from observations made over a period of 18.6 years, and it suggests a period between 1924 and 1942. The "ordinary low water *mark*" is, it maintains, the intersection of this plane of the mean of all low waters with the shoreline.

Artificial Accretions:[7]

The United States notes that it is not presently known whether any issue will be presented in connection with any of the segments to be adjudicated that will involve the location of the "ordinary low water mark" along parts of the coast where there have been artificial changes in the shoreline. However, it gives notice that if any such issue should arise, it will contend that where artificial changes have occurred in the shoreline since 1850, the low-water mark should be determined as of the date when the change was effected. Where artificial structures have brought about additions to the shoreline by accretion, the boundary must be determined, it says, after the Court has decided whether the California rule that accretions artificially induced do not accrue to the owner of adjoining land (*Carpenter* v. *City of Santa Monica,* 63 Cal. App. 2d, 772, 787, 794; 117 Pac. 2d 964, 972-975) or the Federal rule that such accretions do accrue to the owner of adjoining land (*County of St. Clair* v. *Lovingston,* 23 Wall. 46, 66-69) is to be applied.

The *United States* suggests that in the absence of any showing that this issue is necessarily involved in the adjudication of the seven segments now under consideration, there should not be a present adjudication of it.

California:

Ordinary Low Water Mark:

California approves the technical procedures established by the United States Coast & Geodetic survey,[8] but

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[7] The parties agree that gradual natural accretions and relictions should be ignored.

[8] With, however, the express reservation that it "cannot agree in advance to accept a survey by engineers of the opposing party to the litigation without opportunity for cross-examination or for having the survey

it interprets "ordinary low water" as the mean of all the *lower* low waters, rather than the mean of all the low waters.[9]

Artificial Accretions:

Where artificial changes have occurred in the shoreline since 1850, California takes the position that the resultant land areas are excluded from the "lands * * * underlying the Pacific Ocean" referred to in the opinion and in the decree of the Court. Where accretions have added to the shoreline from the presence of artificial structures, California takes the position that the Federal rule should be applied in preference to the California rule.

Thus, the primary issue on Question 3 is whether the mean of *all* low waters, as contended by the United States, or the mean of *lower* low waters, as contended by California, is to be chosen.

The subordinate issue of the effect of artificial changes (which the United States thinks need not now be determined) presents the two questions, (1) Should the low water mark be determined, with respect to artificial changes, as of the date when the change was effected or as of the present date and (2) Where artificial changes have caused accretions to the shoreline, should the California or the Federal rule be applied?

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checked by our own engineers." Presumably the United States would make the same reservation. This reservation does not, however, affect the substance of this report since the duty imposed at this time on the Special Master is only to deal with criteria for making such a survey. Any items of fact embraced within such a reservation could come into question only after the survey had been made in execution of a preliminary judgment fixing criteria.

[9] "There are two low tides daily on the California shore, the 'lower low tide' and the 'higher low tide.' In many places there is a substantial difference between the average of the lower low tides and the average of all the low tides. The former will be further seaward than the latter." (I/60)

Nature and Form of the Evidence Proposed to be Submitted

United States rests its case on a question of law, regarding the facts as not open to dispute. It refers to *Borax, Ltd.* v. *Los Angeles,* 296 U. S. 10, 26-27, as a holding by this Court that under the common law "the ordinary high water mark" meant a mean of all the high tides, and argues by analogy that "the ordinary low water mark" as used by this Court in the instant case signifies a mean of all low tides.

California concedes that in the *Borax* case "ordinary high water mark" was taken to mean the average of all the high tides, but it controverts the deduction of the United States that for the purposes of the present case "ordinary low-water mark is to be defined as the average of all the low tides."

As to the facts, California offers the oral testimony of J. Stuart Watson (I/205-208) to the effect,

> "that all authorities including the U. S. Coast & Geodetic Survey who predict tides for the Pacific Coast and publish navigation charts, the Corps of Engineers, who make Hydrographic Surveys and build Harbor Works and other agencies utilize the *Mean* of the *Lower Low Waters* as the datum for their work. He will show that this *Mean* of the *Lower Low Waters* datum is the most practical datum to use on the Pacific Coast as distinct from the Atlantic Coast for determination of the 'ordinary low-water mark' ".

and it lists for reference (I/208-209) a number of United States Coast & Geodetic Survey charts and 8 official documents and technical publications.

In the Citation of Documents, Volume II, in connection with Mr. Watson's proposed testimony, two publications and charts are listed to support his testimony that the actual

location on the ground of any point on the line intersection of the plane of low water with the shore is a constantly changing thing (371-2, 388-391); that it cannot be determined and fixed as of September 9, 1850 because of the absence of contemporaneous data (373, 378-9, 382, 392-3, 469), and that the low-water mark along the California coast should be taken to mean the average over a period of 18.6 years of the *lower* low waters (II 365); that this "is the official reference datum of the waters of the Pacific Coast" (366-368). The statement of his proposed testimony is further subdivided, with reference to the several subdivisions of the coast line under consideration (II/469B; 495B; 513B and C; and 564B and C).

Since both parties recognize that natural accretions and relictions exist (and agree that they should be ignored) it hardly needs to be proved that the location of any point on the line of intersection of the plane of low water with the shore is a constantly changing thing. Whatever need there may be to determine the low-water mark as of any past date will only be with reference to artificial accretions and the location of the low-water mark at the time they were made. Furthermore, during these proceedings the United States has announced its position as to physical improvements as follows:

> "The Government has taken the position with respect to improvements, physical improvements made, that it does not claim title to them. It does not expect to under any circumstances claim or assert title or take over any improvements which may have been made by the State or by any political subdivision of the State, and we have drafted a bill and have it pending in Congress to make that position clear." (Transcript/127).

The practice of the U.S. Coast & Geodetic Survey and the Corps of Engineers, about which Mr. Watson proposes to

testify, could presumably be correctly ascertained by direct reference to official publications of those government bureaus or by calling on those agencies of government for the desired information.

In the foregoing I have endeavored to state concisely the issues involved at this stage of these proceedings and the nature and form of the evidence proposed to be submitted.

As to the "admission of facts and documents which will avoid unnecessary proof", I find no opportunity for significant simplification. It being conceded that criteria now advanced by the parties have not heretofore been definitely adopted by the United States or established as existing rules of international law, the questions to be determined assume a character which imports, at least argumentatively, wide latitude of reference to developments in the field of international law and to historical and geographical data pertinent to the coastal segments under consideration.

The United States, absent any such established criteria, in effect disclaims as "inland" or "enclosed" waters bays enclosed to the extent measured by the geometric formula it proposes (Cf. *Cunard* v. *Mellon,* 262 U.S. 100, 122-123) just as by stipulation it has already purported to disclaim the area of San Francisco Bay and San Diego Bay (Cf. Order and Decree, 332 U.S. 804) and at least a part of San Pedro Bay. But beyond that it does not go except to recognize that allowances may have to be made for "existing agreements and 'historic' situations" as to which it contends that the burden should be upon California (A/15). The United States, to support its position, lists a certain number of documents, particularly records of proceedings at The Hague Conference of 1930, and offers to put them

in evidence if they are not subject to judicial notice. At the same time it fully reserves the right to refer to matters of common knowledge and to other documents or events of which the Court would take judicial notice.

California, absent such criteria, contends for a much more extensive area of coastal waters shoreward of the base line of the marginal belt and, asserting that the United States, in making the determination, is free to be guided by what it considers to be its best interests, it proposes to introduce the oral testimony and documents relating to international practices, historical events, physical and geographical factors, use and occupancy of the area, maritime trade routes, etc., outlined above. The international practices are dealt with in the proposed commentary by Judge Hudson and the historical aspects in the proposed commentary by Dr. Caughey. The physical, geographic and oceanographic factors, together with the nature and quantitative extent of the sheltering of the waters and the quantitative extent and value of their use and occupancy are dealt with in the proposed oral testimony of the experts, Fitzgerald, Grant, Shepard and Putnam, and in the proposed testimony of the fact witnesses. That the outlying islands shelter to some degree the waters between them and the mainland, and that the use and occupancy of these waters for maritime commerce includes some commerce that is not oceangoing might, perhaps, be a fact so notorious as to be within the range of judicial notice (Cf. *The Apollon,* 9 Wheat, 362, 374; *Peyroux* v. *Howard,* 7 Pet. 324, 342; *Sparrow* v. *Strong,* 3 Wall. 97, 104; *Brown* v. *Piper,* 91 U.S. 37, 42; *Clark* v. *United States,* 99 U.S. 493, 495; *Hoyt* v. *Russell,* 117 U.S. 401, 404; *United States* v. *Rio Grande Dam & Irrigation Company,* 174 U.S. 690; *Parker* v. *Brown,* 317 U.S. 341, 363). But if the quantitative degree of sheltering and the quantitative extent and value of the occupancy and use are to be given significant weight in the judgment

of the Court, as California contends they should be, then the proposed testimony would, I should suppose, assume a different aspect of importance. In any event, the many documents listed by California—statutes, government charts and reports, historical and statistical treatises, etc., are of such a character that there has been no suggestion that their text or their authenticity is or would be disputed or made the subject of unnecessarily technical proof. California, like the United States, reserves the right to refer to additional documents and in the lists of documents already submitted it frequently includes, without particularizing, general reference to California Statutes, Municipal Records, entire volumes of history, exploration and the like, and other works of general reference.

With the documentary material thus outlined, and subject to these reservations, and having regard to the wide divergence of the contestants' views as to how the Court should be informed, or inform itself, on these matters, it has been found impracticable to presently delimit the field by selection and admission of particular documents or by further admission of matters of fact.

Respectfully submitted,

WILLIAM H. DAVIS

New York, New York,
May 22, 1951.

Note 1: The stated position of the United States as to the status of the waters within a strait (whether "territorial sea" or "high sea") is that in the case of straits connecting two areas of high sea, where the land on each side of the strait belongs to a single nation, and both entrances to the strait do not exceed six nautical miles in width, all of the waters of the strait are in the marginal belt; if both or either entrance exceeds six nautical miles in width, the marginal belt is measured from the low-water mark along

each coast. Where there is a group of islands with the islands less than six nautical miles apart (as is true along the outer edge of the Santa Barbara Channel), the respective marginal belts around such islands overlap and constitute in effect a single continuous belt. Where a small area or pocket of high sea is totally surrounded by the marginal belt (as, for example, where an archipelago of offshore islands is near the shore of the mainland and the respective marginal belts overlap at each end) the surrounded area of high sea is assimilated to the marginal belt of the country; if there is a pronounced concavity or indentation of high sea situated either between marginal belts drawn around islands or between the belt around an offshore island and the belt adjacent to the mainland, such a concavity of high sea may be assimilated to the marginal belt if a line drawn across the entrance of the concavity is not more than four nautical miles in length and the area enclosed by such line and the respective belts is greater than the area of a semi-circle the diameter of which is equal to the length of such line (A/19-20).

APPENDIX I

The stated position of the parties as to the boundary[10] of each of the seven segments in dispute is as follows:

1. The Segment from Point Conception to Point Hueneme (Group 1(a)—Chart 5202)

Boundary Claimed by the United States: The ordinary low-water mark of the Pacific Ocean along the mainland of California beginning at Point Conception and extending therefrom in an easterly direction to Point Hueneme, following the sinuosities of the ordinary low-water mark, except where the ordinary low-water mark is interrupted by the mouths of Goleta Slough, Carpenteria Creek, Rincon Creek, Ventura River, and Santa Clara River, at which places the line is a straight line drawn across the mouths of all such tributary waterways in the general direction of the coast from the point where the said low-water mark leaves the open coast and enters the tributary waterway to the point on the opposite shore where the said low-water mark emerges from the tributary waterway and again follows the shore of the open coast (A/2-3).

Boundary Claimed by California: This segment, together with segments 1(b), 1(c) and 2(d), should, California contends, be embraced in an overall unit area of inland waters. If the boundary of this overall unit area should not be adopted, then two alternative and progressively more restricted boundaries are proposed (I/5-10).

a. *Proposition 1* (Charts 5101 and 5202)

"*The over-all unit area of inland waters* proposed by California is the area landward of the following base-line from which the three-mile belt of marginal sea should be measured:

"From Point Conception to Richardson Rock;
"Thence to Point Bennett on San Miguel Island;

[10] The boundary lines claimed by the parties are shown on the charts accompanying this report; the United States' proposals in red and California's in green.

"Thence to unnamed rock opposite Adams Cove, to headland west of Judith Rock, along the outermost rocks lying off the southern shore of San Miguel Island to Judith Rock and across Tyler Bight to Crook Point and to Cardwell Point;

"From Cardwell Point to Sandy Point on Santa Rosa Island;

"Thence to Bee Rock, to Cluster Point from headland to headland and to South Point;

"Thence across Johnsons Lee to Ford Point and along the outermost rocks to East Point on Santa Rosa Island;

"Thence to Gull Island off Santa Cruz Island;

"Thence to the reef extending northward from Begg Rock;

"Thence to the rocks lying off the northwestern extremity of San Nicolas Island, and from headland to headland along the southern shore of San Nicolas Island to the extremity of the sand-spit on the eastern end of San Nicolas Island;

"Thence to Castle Rock off the Northwestern extremity of San Clemente Island;

"Thence to the headland west of West Cove, across West Cove to a headland about three miles south, to Eel Point, across a bay to the south headland thereof, across Seal Cove to Mail Point, from headland to headland and to the most western island at China Point;

"Thence to the most southern island at China Point across Pyramid Cove to White Washed Rock and to the eastern extremity of Pyramid Head;

"Thence to Church Rock off the eastern tip of Santa Catalina Island;

"Thence along the off-lying rocks to Seal Rocks, and to Jewfish Point;

"Thence to the eastern jetty at the entrance to Newport Bay."

b. *Proposition 2* (Charts 5101 and 5202)

"*A first alternative unit area of inland waters* would be bounded by a line as follows:

"From Point Conception to Gull Island, as in the preceding paragraph;

"From Gull Island to the eastern headland of Laguna Harbor, across headlands to Bowen Point, from headland to headland to Sandstone Point;

"Thence along outlying rocks, across Yellowbanks Anchorage and across Smugglers' Cove to San Pedro Point;

"Thence to the western extremity of the westernmost of the Anacapa Islands and thence to Cat Rock;

"Thence to the southernmost point of the middle island, to the eastern extremity of the Anacapa Islands, to Arch Rock;

"Thence to the western extremity of Santa Barbara Island, thence to Sutil Island and along the western and southern shores of Sutil Island to the southernmost point of Santa Barbara Island;

"Thence across the bay south of Catalina Harbor and Little Harbor to Ben Weston Point on Santa Catalina Island;

"Thence along the southern shore of Santa Catalina Island to Salta Verde Point, to Church Rock, and to Seal Rocks;

"Thence along the eastern shore of Santa Catalina Island to Jewfish Point;

"Thence to the eastern jetty at the entrance to Newport Bay."

c. *Proposition 3* (Charts 5101 and 5202)

"*A second alternative unit area of inland waters* would be bounded by a line drawn as follows:

"From Point Conception to Anacapa Island Light, as in the preceding paragraph;

"From Arch Rock to Point Hueneme;

"Thence across the entrance to Port Hueneme and along the shore of the mainland taking account of off-lying rocks to Laguna Point;

"Thence across the bay lying seaward of Mugu Lagoon to Point Mugu;

"Thence along the shore of the mainland taking account of off-lying rocks, to the reef seaward of a small rock 150 yards southward of Point Dume;

"Thence to the rock 250 yards southwestward from Point Vicente;

"Thence to West End on Santa Catalina Island, to Eagle Rock and to Ribbon Rock;

"Thence across the bay south of Catalina Harbor and Little Harbor to Ben Weston Point on Santa Catalina Island;

"Thence along the southern shore of Santa Catalina Island to Salta Verde Point, to Church Rock and to Seal Rocks;

"Thence along the eastern shore of Santa Catalina Island to Jewfish Point;

"Thence to the eastern jetty at the entrance to Newport Bay."

2. Segment of San Pedro Bay (Group 1(b)—Charts 5101 and 5147)

United States: Recognizes the waters of San Pedro Bay as "inland waters" when delimited by a straight line beginning at a point on the ordinary low-water mark of the Pacific Ocean eight hundred and fifty (850) yards distant in an easterly direction from the Point Fermin lighthouse (as shown on United States Coast and Geodetic Survey Chart No. 5147, corrected to June 30, 1947) and near latitude 33°42′23″, longitude 118°17′06″, thence running in an easterly direction through a point 300 feet due south of the easterly extension of the Navy mole and breakwater to the point of intersection with the ordinary low-water mark of the Pacific Ocean in front of the city of Long Beach (A/3).

California: Embraced within each of the three alternative propositions stated with reference to segment Group 1(a) above.

3. Segment from San Pedro Bay to the Western Headland at the Entrance to Newport Bay (Group 1(c) —Chart 5101 and old Chart 671)

United States: "The ordinary low-water mark of the Pacific Ocean along the mainland of California, beginning at the point at which the straight line constituting the seaward limit of San Pedro Bay intersects said ordinary low-water mark in front of the city of Long Beach and extending therefrom in a southeasterly direction to the point where the ordinary low-water mark is intersected by the western headland at the entrance to Newport Bay, following the sinuosities of the ordinary low-water mark, except where such lower-water mark is interrupted by the mouths of Alamitos Bay (San Gabriel River), Anaheim Bay, and the Santa Ana River, at which places the line is a straight line joining the headlands of all such tributary waterways." (A/3).

California: Embraced within the three alternative propositions stated with reference to segment Group 1(a) above. "If, for any reason, it becomes necessary to determine the outer limits of * * * San Pedro [Bay], apart from the larger areas of inland waters" described in its three propositions, these outer limits should be defined as follows: San Pedro Bay, a line drawn from Point Fermin to a point referred to as Point Lasuen, as indicated on map Old 671 (I/10).

4. Segment of Santa Monica Bay (Group (2d)— Chart 5101)

United States: "The ordinary low-water mark of the Pacific Ocean along the mainland of California, beginning at Point Dume and extending therefrom along the shore to Point Vicente, following the sinuosities of the said low-water mark, except where such low-water mark is interrupted by the mouth of Ballona Creek, at which place the

line is a straight line" joining the headlands of Ballona Creek (A/5).

California: Embraced within each of the three alternative propositions stated with reference to segment Group 1(a) above. If, for any reason, it becomes necessary to determine the outer limits of Santa Monica Bay apart from the larger areas of inland waters described in these three propositions, these outer limits should be defined by a line drawn from Point Dume to Point Vicente, as adjudicated by the California Supreme Court in *People* v. *Stralla,* 14 Cal. 2d, 617; 96 Pac. 2d, 941.

5. The Segment at Crescent City (Group 2(a)—Charts 5702 and 5895)

United States: "The ordinary low-water mark of the Pacific Ocean along the mainland of California, beginning at Battery Point and extending therefrom in an easterly and southerly direction to the mouth of Cushing Creek, following the sinuosities of the ordinary low-water mark, except where such low-water mark is interrupted by the mouth of Elk Creek, at which place the line is a straight line" joining the headlands of Elk Creek (A/4).

California: Waters delimited around St. George Reef by a line drawn from Prince Island off Pyramid Point to Northwest Seal Rock, back to Southwest Seal Rock, thence to Whale Rock, thence to Hump Rock, thence to Star Rock, thence to Castle Rock, thence to White Rock, thence to Steamboat Rock, thence to Round Rock, thence to Sister Rocks, and thence to False Klamath Rock. Alternatively, California states that the line may be drawn from the outermost island or rock off the extremity of Battery Point to Steamboat Rock, thence to Round Rock, and thence to the rocks off the point between the mouths of Cushing Creek and Nickel Creek. (See Crescent City Bay, Chart 5895, California's Exhibit 2, and California Statutes 1949, Chapter 65).

6. The Segment at Monterey Bay (Group 2(b)—Chart 5402)

United States: "The ordinary low-water mark of the Pacific Ocean along the mainland of California, beginning at Point Santa Cruz and extending therefrom along the shore to Point Pinos, following the sinuosities of the ordinary low-water mark, except where such low-water mark is interrupted by the mouths of the San Lorenzo River, Soquel Creek, Aptos Creek, Pajaro River, Elkhorn Slough, and Salinas River, at which places the line is a straight line" joining the headlands of all such tributary waterways (A/4).

California: Line drawn from the rocks off Point Santa Cruz to the rocks off Point Pinos (as adjudicated by the California Supreme Court in *Ocean Industries, Inc.* v. *Superior Court,* 200 Cal. 235; 252 Pac. 722).

7. Segment of San Luis Obispo (Group 2(c)—Charts 5302 and 5386)

United States: "The ordinary low-water mark of the Pacific Ocean along the mainland of California, beginning at Point San Luis and extending therefrom along the shore in an easterly direction, following the sinuosities of the ordinary low-water mark, except where such low-water mark is interrupted by the mouth of San Luis Obispo Creek, at which place the line is a straight line" joining the headlands of such tributary waterway (A/5).

California: Line drawn from the extreme point of Point San Luis to the extremity of Point Sal (see San Luis Obispo Bay, Chart 5386, California's Exhibit 4).

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